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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41507

GROW GROUP, INC.
v.
JONES TRUCK LINES, INC.

Decided: October 6, 1997

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Because of our finding under section 2(e) of the NRA, we will not reach the other issues raised in the proceeding.

BACKGROUND

This complaint arises out of the efforts of Jones Truck Lines, Inc. (Jones or defendant) to collect undercharges for certain shipments transported by Grow Group, Inc. (Grow or complainant). The matter is before the Board on referral from the United States District Court for the Western District of Kentucky, Louisville Division, in *Grow Group, Inc. v. Jones Truck Lines, Inc.*, Civil No. C93-0484-L(H).[2] In the court action, Jones claims undercharges totaling $17,006.78, allegedly due, in addition to amounts previously paid, for transporting 147 shipments of paint and related materials between July 9, 1988, and April 27, 1989. The shipments were less-than-truckload (LTL) movements transported from complainant's facilities in Houston, TX, Oklahoma City, OK, and Baton Rouge, LA, to points in Oklahoma, Missouri, Arkansas, Illinois, Texas, Indiana, and Alabama. There was also one shipment from Louisville, KY to Oxford, MS, and there were three shipments from St. Louis, MO, to petitioner's facility at Oklahoma City, OK. By order dated November 28, 1994, the court stayed the proceeding and directed complainant to submit the issue of rate reasonableness to the ICC for determination.[3]

Pursuant to the court order, Grow, by complaint filed December 21, 1994, requested the ICC to resolve the court-referred issues. By decision served February 2, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. Complainant filed its opening statement on April 4, 1995; defendant filed a reply statement on June 30, 1995; and complainant filed a rebuttal statement on July 24, 1995.

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

[2] Jones originally filed a complaint against Grow in the Commonwealth of Kentucky, Jefferson Circuit Court; the matter was removed to the United States District Court for the Western District of Kentucky, Louisville Division.

[3] The court determined, as a factual matter, that Jones acted as a common, and not contract, carrier in its dealings with Grow. The court also made at least a preliminary finding that the NRA is applicable to Jones.

Grow claims that the shipments in question were billed and paid based upon rates negotiated between Jones and Grow, and that Grow tendered its freight in reliance upon the negotiated rate. Complainant argues that defendant's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA.[4]

Complainant supports its argument with two affidavits. The first is from John J. Kelleher, Transportation Manager for Grow, who states that rates were negotiated with Jones, that Jones billed Grow at the agreed-upon rates, and that Grow paid the bills in full. Mr. Kelleher also states that both Jones and Grow intended that the discount rates that they worked out together would be competitive with those of other carriers available to move Grow's freight. The second affidavit is from Morris Durbin, a former account representative of Jones. Mr. Durbin states that he personally negotiated rates on behalf of Jones with Mr. Kelleher, and that the rates negotiated, charged, and paid by Grow were comparable to the rates charged by other motor carriers with which Jones competed.

Included in Grow's opening statement (Exhibit D) is an executed document, effective May 18, 1987, bearing the signatures of representatives of Jones and Grow entitled "Transportation Agreement" (TA).[5] The document includes a reference to Jones' contract carrier Permit No. 111231 (Sub-No. 382). It provides for the application of a 46 to 51% discount off the applicable class rates for Grow's inbound and outbound, collect LTL shipments to and from its facility in Houston TX, to Jones' direct service points. In addition, Grow submitted copies of balance due bills issued by Jones that reflect an originally assessed rate to which discounts were applied.

Jones argues, through a verified statement submitted by Stephen L. Swezey, Senior Transportation Consultant for Carrier Services, Inc. (CSI),[6] that the rates assessed initially should have been those on file with the ICC without a discount. Mr. Swezey contends that the 46 to 51% discounts originally granted to Grow were not supported by an applicable tariff because complainant did not, as required by the terms of the tariff, provide written notification of its participation in the discount tariff.[7] Defendant maintains, therefore, that the revised bills reflect the appropriate charge for the service rendered. With respect to complainant's claim that section 2(e) of the NRA governs this matter, defendant contests the applicability of that provision on statutory and constitutional grounds.[8]

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[4] Grow also argued initially that Jones' actions violated the ICC's credit regulations and that Jones was thus barred from pursuing its claims. Grow offered no evidence or argument on this issue, and we need not discuss it further.

[5] The TA was actually executed by Jones and an entity entitled Devoe & Reynolds, which is a division of Grow.

[6] CSI is the organization authorized by the bankruptcy court to audit defendant's records and issue the subject balance due bills.

[7] Mr. Swezey attaches as Appendix C three customer participation request forms (forms Jones claims it used to indicate a shipper's participation in a tariff) applicable to Grow's traffic from Houston, Oklahoma City, and Baton Rouge, bearing effective dates of January 20, 1989, December 15, 1988, and October 17, 1988, respectively, signed and approved by representatives of Jones. Mr. Swezey also states that all shipments but one moved before the above effective dates. The one shipment was a "Collect on Delivery" shipment. Mr. Swezey also states that complainant requested cancellation of a discount applicable to its Louisville, KY facility effective May 18, 1989.

[8] Jones argues that section 2(e) of the NRA is inapplicable to bankrupt carriers, may not be applied retroactively, and is unconstitutional. We point out that six federal circuit courts of appeals and virtually every other federal court that has considered respondent's applicability arguments have determined that the remedies provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers such as Jones. *See Whitaker v. Power Brake Supply, Inc.*, 68 F.3d 1304 (11th Cir. 1995) (*Power Brake*); *Jones Truck Lines, Inc. v. Whittier Wood Products, Inc.*, 57 F.3d 642

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DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA.[9] Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[10]

We note that section 2(e)'s availability is not limited to situations where the originally billed rate was unfiled. In evaluating whether a carrier's collection would be an "unreasonable practice" under section 2(e), the Board must consider, *inter alia*, whether the shipper was offered a rate by the carrier "other than that legally on file with the Board *for the transportation service*." Section 2(e)(2)(A) (emphasis added). If the carrier and shipper agreed to a price that was embodied in a filed rate that cannot be applied to the involved shipments, then the shipper was offered a rate

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(8th Cir. 1995) (*Whittier Wood*); *In re Matter of Lifschultz Fast Freight Corporation*, 63 F.3d 621 (7th Cir. 1995); *In re Transcon Lines*, 58 F.3d 1432 (9th Cir. 1995) *cert. denied*, 116 S. Ct. 1016 (1996); *In re Bulldog Trucking, Inc.*, 66 F.3d 1390 (4th Cir. 1995); *Hargrave v. United Wire Hanger Corp.*, 73 F.3d 36 (3d Cir. 1996); *see also, e.g., Jones Truck Lines, Inc. v. AFCO Steel, Inc.*, 849 F. Supp. 1296 (E.D. Ark. 1994).

Further, as the courts have also held consistently, section 2(e), by its own terms and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. *See, e.g., Jones Truck Lines, Inc. v. Scott Fetzer Co.*, 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); *North Penn Transfer, Inc. v. Stationers Distributing Co.*, 174 B.R. 263 (N.D. Ill. 1994); *Gold v. A.J. Hollander Co.* (In re Maislin Indus.), 176 B.R. 436 (Bankr. E.D. Mich. 1995); *cf. Jones Truck Lines, Inc. v. Phoenix Products Co.*, 860 F. Supp. 1360 (W.D. Wisc. 1994).

Lastly, in response to respondent's "takings" challenge, the Eighth Circuit in *Whittier Wood* and the Eleventh Circuit in *Power Brake* have concluded that the NRA does not work an unconstitutional taking under the Fifth Amendment. 57 F.3d at 649-52; 68 F.3d at 1306 n.3. We point out that the courts have consistently rejected that argument, as well as respondent's "separation of powers" argument and its other constitutional challenges to the NRA. *See, e.g., Gold v. A.J. Hollander, supra; American Freight System, Inc. v. ICC* (In re American Freight System, Inc.), 179 B.R. 952 (Bankr. D. Kan. 1995); *Rushton v. Saratoga Forest Products, Inc.* (In re Americana Expressways), 177 B.R. 960 (D. Utah 1995), *rev'g* 172 B.R. 99 (Bankr. D. Utah 1994); *Zimmerman v. Filler King Co.* (In re KMC Transport), 179 B.R. 226 (Bankr. D. Idaho 1995); *Lewis v. Squareshooter Candy Co.* (In re Edson Express), 176 B.R. 54 (D. Kan. 1994).

[9] We recognize that the court referred this case on the issue of rate reasonableness. Nevertheless, our use of section 2(e)'s "unreasonable practice" provisions to resolve this matter is fully appropriate. The Board, as a general rule, is not limited to deciding only those issues explicitly referred by the court or raised by the parties. Rather, we may instead decide cases on other grounds within our jurisdiction, and, in cases where section 2(e) provides a dispositive resolution, we rely on it rather than the more subjective rate reasonableness provisions. *See Have a Portion, Inc. v. Total Transportation, Inc., and Thomas F. Miller, Trustee of the Bankruptcy Estate of Total Transportation, Inc.*, No. 40640 (ICC served Feb. 7, 1995).

[10] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of the January 1, 1996.

not legally on file "for [that] transportation service." Thus, even if "some of [a carrier's undercharge claims] are based on it billing and collecting an erroneous [filed] rate, if the so-called erroneous rate was negotiated between the shipper and [carrier] and if the shipper reasonably relied on the rate, the rate would meet the definition of a negotiated rate and trigger the application of the provision of the NRA." *American Freight System, Inc. v. ICC* (In re American Freight System), 179 B.R. 952, 957 (Bankr. D. Kan. 1995).

It is undisputed that Jones no longer transports property.[11] Accordingly, we may proceed to determine whether Jones' attempt to collect undercharges (the difference between the applicable filed tariff rate and the negotiated rate) is an unreasonable practice.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed on by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains a 1987 transportation agreement signed by the parties which confirms the existence of a negotiated discount rate and also lends credibility to Grow's two supporting affidavits.[12] In addition, complainant has submitted representative sample documents indicating that the original freight bills issued by defendant consistently applied rates that reflected the stated 46 to 51% discount called for in the transportation agreement. We find this evidence sufficient to satisfy the written evidence requirement. *E.A. Miller, Inc.--Rates and Practices of Best*, 10 I.C.C.2d 235 (1994) (*E.A. Miller*).[13] *See William J. Hunt, Trustee for Ritter*

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[11] Board records confirm that Jones' motor carrier operating rights were revoked on February 18, 1992.

[12] We recognize that the court has already found that Jones acted as a common carrier, but the contract nevertheless can be used as written evidence of a negotiated rate.

[13] Jones, at p. 11 of its statement, argues that freight bills do not constitute written evidence. Defendant contends that, under section 2(e)(2)(D) of the NRA, the Board must consider whether the negotiated rate "was billed and collected by the carrier" in making its merits determination as to whether a carrier's conduct was an "unreasonable practice." This section, according to Jones, contemplates that freight bills reflecting the negotiated rate were issued by the carrier, and the Board must examine the freight bills to determine if section 2(e) has been satisfied. Jones asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 2(e)(2)(D), must independently consider the collected freight bill.

The ICC and the Board have consistently rejected this argument. Section 2(e)(2)(D) requires the Board to consider "whether the [unfiled] rated was billed and collected by the carrier." There is no requirement under this provision or the NRA's legislative history that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from using such statements (or other evidence) in finding that section 2(e)(2)(D) was satisfied.

Even if the Board uses freight bills to satisfy this element, however, it is not inappropriate for it to use those same bills to satisfy the "written evidence" requirement of section 2(e)(6)(B). The carrier's argument might be more persuasive if the written evidence requirement were a "sixth" element of the merits determination under section 2(e)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold definitional requirement needed to invoke section 2(e). *See E.A. Miller*, 10 I.C.C.2d 239-40 (1994). Once that requirement is satisfied by freight bills (or other contemporaneous written evidence), there is nothing to suggest that the same evidence could not be used as part of the Board's separate five-part analysis under section 2(e)(2) to determine

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Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rates and that the rates were agreed upon by the parties).

In this case, the evidence is substantial that the rates originally billed by the carrier and paid for by the shipper were rates agreed to in negotiations between the parties. The original freight bills issued by the carrier confirm the rates set forth in the 1987 agreement and reflect the existence of negotiated rates.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance on the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Jones concedes that, if section 2(e) is read to apply to this case, it will preclude the Trustee from collecting on his claims. We agree. The evidence establishes that discounted rates were offered to Grow by Jones; that Grow tendered freight in reliance on the agreed-to rate; that the negotiated rate was billed and collected by Jones; and that Jones now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Jones to attempt to collect undercharges from Grow for transporting the shipments at issue in this proceeding.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on the service date.

3. A copy of this decision will be mailed to:

The Honorable John G. Heyburn II
United States District Court for the
Western District of Kentucky, Louisville Division
Gene Snyder U.S. Courthouse
601 West Broadway, Rm. 239
Louisville, KY 40202

Re: Civil No. C93-0484-L(H)

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams
Secretary

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[13](...continued)
whether the carrier's undercharge collection is an unreasonable practice.